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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 99 254 53464 Office: California Service Center Date: AUG 2 1 2000

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

IN BEHALF OF PETITIONER: [redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a camera repairing service. It desires to employ the beneficiary as a journeyman camera technician for a period of one year. The Department of Labor determined that a temporary certification by the Secretary of Labor could not be made. The director determined a temporary need for the beneficiary's services had not been established.

On appeal, counsel states that in order to maintain its customers, the petitioner decided to recruit the beneficiary to train its inexperienced repairman and back-up its journeyman repairman, until the inexperienced repairman can function as a journeyman. Counsel contends that the position offered is not permanent.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

> an alien...having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. See 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. 214.2(h)(6)(ii)(B).

The petition indicates that the employment is a one-time occurrence and the temporary need is unpredictable.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish that it will not need workers to perform the services or labor in the future.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

> Work independently without supervision to test and diagnose defects and malfunctions in both mechanical and electronic cameras, formulate corrective actions and determine costs of such repairs, and to carry out such repairs upon customer approval. Use traditional and hi-tech equipments related to camera diagnostics and repair.

Counsel states that the petitioner has been operating its business with one journeyman repairman and another inexperienced repairman. Counsel explains that the beneficiary is only being hired to train the inexperienced repairman and to back-up the journeyman repairman. Counsel estimates that the beneficiary will only be needed until the inexperienced repairman can function as a journeyman, which is estimated to take about nine months.

The services to be performed do not indicate that the beneficiary will be doing any training. The duties are shown to be ongoing, and it is clear that the petitioner has a permanent need for a worker in that position. The services to be rendered cannot be classified as duties that will not need to be performed in the future especially when the petitioner states that its customers are complaining about delayed and missed repair assignments. Further, the petitioner has not demonstrated that the beneficiary can train its inexperienced repairman to function as a journeyman within nine months. Consequently, the petitioner has not established that the nature of its need for a journeyman camera technician is temporary is nature.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.